

**Broszkiewicz v 160 Wooster St., LLC**

2007 NY Slip Op 31534(U)

June 4, 2007

Supreme Court, New York County

Docket Number: 0104801/2004

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN  
Justice

PART 7

ADAM BROSZKIEWICZ,  
Plaintiff,

INDEX NO. 104801/04

- v -

MOTION DATE 12/22/06

MOTION SEQ. NO. 003

160 WOOSTER STREET, LLC and FLINTLOCK  
CONSTRUCTION SERVICES, LLC,

MOTION CAL. NO. 141

Defendants.

**FILED**  
JUN 08 2007  
COUNTY CLERK'S OFFICE  
NEW YORK

(And a third-party action)

The following papers, numbered 1 to 19 were read and cross motions for summary judgment

Notice of Motion— Affidavits — Exhibits

PAPERS NUMBERED

1-2

Notices of Cross Motion— Answering Affidavits — Exhibits

3-13

Replying Affidavits

14-19

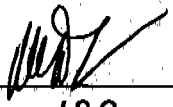
Cross-Motions (3):  Yes  No

Upon the foregoing papers, It is ordered that this motion and cross motions are determined in accordance with the annexed memorandum decision and order.

J.S.C.

**HON. MICHAEL D. STALLMAN**

Dated: 6/4/07  
New York, New York

  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE DATED:

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7

-----X

ADAM BROSZKIEWICZ,

Plaintiff,

**Decision and Order**

-against-

Index No. 104801/04

160 WOOSTER STREET, LLC and FLINTLOCK  
CONSTRUCTION SERVICES, LLC,

Defendants.

-----X

FLINTLOCK CONSTRUCTION SERVICES, LLC,

Third-Party Plaintiff,

Third-Party

-against-

Index No. 590635/04

IBK CONSTRUCTION CORP. and IBK  
ENTERPRISES, INC.,

Third-Party Defendants.

-----X

**MICHAEL D. STALLMAN, J.:**

This is an action arising out of a work-related injury. Third-party defendants IBK Construction Corp. and IBK Enterprises, Inc. (collectively, IBK) move (seq. no. 003) for summary judgment dismissing the complaint. Plaintiff Adam Broszkiewicz cross-moves for partial summary judgment on his Labor Law §§ 240 and 241 (6) causes of action. Defendant/third-party plaintiff Flintlock Construction Services, LLC (Flintlock) cross-moves for summary judgment: (1) dismissing plaintiff's Labor Law §§ 200, 240, and 241 (6) and common-law negligence claims as against it; and (2) granting its third-party claim against IBK for contractual indemnification. Defendant 160 Wooster Street, LLC (160 Wooster) cross-moves for summary judgment: (1) dismissing plaintiff's Labor Law §§ 200, 240, and 241 (6) and common-law negligence claims as against it; and (2)

granting its cross claims against Flintlock for contractual and common-law indemnification.

### **BACKGROUND**

On March 9, 2004, plaintiff was employed as a laborer by third-party defendant IBK Construction Corp. (IBK Construction). Plaintiff was working on a construction project at 160 Wooster Street in Manhattan, which consisted of constructing a new residential condominium building. Flintlock was the general contractor on the job, which hired IBK Construction as the concrete and superstructure subcontractor. 160 Wooster was the owner of the building.

Plaintiff alleges that his accident occurred while he was performing work on an unsecured A-frame ladder on the eighth floor of the building, which was unfinished. He claims that he fell from the ladder while installing aluminum beams that would form part of a bulkhead roof. Plaintiff landed on the floor below, which was larger than the eighth floor. There was a safety railing along the perimeter of the eighth floor, which had been installed by IBK Construction approximately one week before the accident. However, the railing did not prevent plaintiff's fall. Plaintiff alleges that defendants Flintlock and 160 Wooster violated sections 200, 240, 241, and 241-a of the Labor Law and were negligent, inter alia, in failing to provide plaintiff with a properly secured ladder and safe work site.

160 Wooster cross-claimed against Flintlock for indemnification and breach of contract for failure to procure insurance. Flintlock impleaded IBK, seeking contractual and common-law indemnification and contribution.

### **DISCUSSION**

The standards for summary judgment are well settled. The movant must make a prima facie showing of entitlement to judgment as a matter of law, by tendering sufficient evidence in admissible

form to demonstrate that there are no triable issues of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). A failure to make such a showing requires that the motion be denied, regardless of the sufficiency of the opposing papers (*Ayotte*, 81 NY2d at 1063). If the movant meets this burden, then the burden shifts to the nonmovant to show, also through admissible evidence, that there is a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

### **Labor Law § 240**

Labor Law § 240 (1) provides that:

All contractors and owners and their agents . . . in the erection, demolition, repairing, altering . . . of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders . . . and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

Section 240 imposes absolute liability on contractors and owners irrespective of their negligence and whether they supervised or controlled the work (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). The statute applies to “risks related to elevation differentials,” including “those related to the effects of gravity where protective devices are called for . . . because of a difference between the elevation level of the required work and a lower level” (*id.* at 514; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]; *Brennan v RCP Assocs.*, 257 AD2d 389, 390 [1st Dept], *lv dismissed* 93 NY2d 889 [1999]).

To impose liability under the statute, a plaintiff need only prove: (1) a violation of the statute (i.e., the owner or contractor failed to provide adequate safety devices); and (2) that the statutory

violation proximately caused his or her injuries (*see Bland v Manocherian*, 66 NY2d 452, 459 [1985]). Proximate cause requires that a defendant's act or failure to act "was a substantial cause of the events which produced the injury" (*Gordon v Eastern Ry. Supply, Inc.*, 82 NY2d 555, 562 [1993], quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784 [1980]). A prima facie case is made out where the risk of some injury from defendants' conduct was foreseeable (*id.*).

In ladder cases, it is sufficient for purposes of liability under section 240 (1) that adequate safety devices to prevent the ladder from slipping or to protect plaintiff from falling were absent (*Orellano v 29 E. 37<sup>th</sup> St. Realty Corp.*, 292 AD2d 289, 291 [1st Dept 2002]; *Wasilewski v Museum of Modern Art*, 260 AD2d 271 [1st Dept 1999]). A plaintiff need not show that the ladder was defective (*Orellano*, 292 AD2d at 290-291). In *Wasilewski*, *supra*, the plaintiff was injured as a result of falling from an unsecured A-frame ladder that failed to support him safely. The ladder was not secured to anything stable, and was not chocked or wedged in place. Neither were any other safety devices, such as safety belts, provided to prevent the plaintiff's fall. Thus, a statutory violation was established (*Wasilewski*, 260 AD2d at 271). Plaintiff's account of the accident, that the ladder shook and moved, was also sufficient to establish proximate cause as a matter of law. "[T]here [was] no view of the evidence that supports a finding that plaintiff's actions were the sole cause of his injuries" (*id.* at 272).

Here, plaintiff submits an affidavit in which he avers that his accident occurred while securing beams to the ceiling on the eighth floor of the building with a co-worker. At the time of the accident, he was working on an 8-foot A-frame ladder, securing a beam to a position over his head. He states that when the beam shifted, the ladder fell over, causing him to fall 20 feet to the

floor below. The ladder was not secured in any fashion at the top or bottom, nor was it held by a co-worker. He further avers that the safety railing did not stop his fall because the ladder was above the railing. According to plaintiff, he was not supplied with safety devices, such as a safety line, safety belt or harness, while he was working, and there were no life nets on the side of the building (Broszkiewicz Aff., ¶¶ 2-4). Plaintiff's affidavit is also consistent with his testimony at his examination before trial, where he testified that, before his accident, he was standing two rungs from the top of a fiberglass ladder and was installing a beam. No one was holding the ladder. When the beam moved, the ladder also moved, which then caused him to fall down two floors (Broszkiewicz EBT, at 26, 32-34). Plaintiff's evidence demonstrates that the ladder failed to perform its essential elevating function, and that he fell as a result. Thus, plaintiff has made a prima facie case for summary judgment under section 240 (1) (*see Klein v City of New York*, 89 NY2d 833, 834-835 [1996]; *Vega v Rotner Mgt. Corp.*, \_\_\_ AD3d \_\_\_, 2007 WL 1500869, \*1 [1st Dept, May 24, 2007]).

IBK, Flintlock, and 160 Wooster's opposition is unavailing. Though they claim that the safety railing was an adequate safety device, they have not disputed that the ladder was not provided with any safety devices to prevent it from falling over, and was not secured in any way<sup>1</sup> (*see Wasilewski*, 260 AD2d at 271; *see also Bonanno v Port Auth. of N.Y. and N.J.*, 298 AD2d 269, 270 [1st Dept 2002]). Moreover, the fact that the ladder did not have any defects is of no moment (*see Orellano*, 292 AD2d at 290-291).

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<sup>1</sup>Counsel for IBK asserts, without any support, that plaintiff was provided with a harness (Seltzer Affirm. in Opp. to Plaintiff's Cross Motion, at 5). However, an attorney's affirmation is without evidentiary value in opposition to a motion for summary judgment, where the attorney has no personal knowledge of the facts (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). In any event, the evidence shows quite the contrary. Plaintiff testified that he asked for a harness on the date of the accident, but was not given one (Broszkiewicz EBT, at 58, 61).

Neither was plaintiff the sole proximate cause of his injuries. As in *Wasilewski*, there is no view of the evidence to support a finding that plaintiff's actions were the sole cause of his injuries (see *Blake v Neighborhood Hous. Servs. of N.Y. City, Inc.*, 1 NY3d 280, 290-292 [2003]; *Weininger v Hagedorn & Co.*, 91 NY2d 958, 960, *rearg denied* 92 NY2d 875 [1998]; *Hart v Turner Constr. Co.*, 30 AD3d 213, 214 [1st Dept 2006]). At plaintiff's examination before trial, he testified that he did not remember whether he dropped or lost his grip on the beam (Broszkiewicz EBT, at 178). However, he also testified that immediately before the beam moved, he was holding onto the beam with both of his hands, but once he felt the beam start to move, he held onto the ladder with both hands (*id.* at 178, 184). Even if he did drop the beam, this would constitute, at most, comparative negligence, which is not a defense to a claim under section 240 (1) (see e.g. *Williams v 520 Madison Partnership*, 38 AD3d 464, 466 n 2 [1st Dept 2007]; *Miraglia v H & L Holding Corp.*, 36 AD3d 456, 457 [1st Dept 2007]). There is also no evidence that plaintiff was using the ladder improperly.

Therefore, plaintiff is granted judgment on liability on his section 240 (1) cause of action, and IBK, Flintlock, and 160 Wooster's motions to dismiss this cause of action are denied.

#### **Labor Law § 241 (6)**

Labor Law § 241 (6) requires owners and contractors to "provide reasonable and adequate protection and safety" for workers performing the inherently dangerous activities of construction, excavation and demolition work (see also *Ross*, 81 NY2d at 501). Under this section, a plaintiff must identify a concrete specification of the New York State Industrial Code, containing "specific, positive commands," rather than a provision reiterating common-law safety standards (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 349 [1998]). The violation of an Industrial Code provision

provides “some evidence of negligence,” which is to be considered along with all other evidence on the issue (*Ramputi v Ryder Constr. Co.*, 12 AD3d 260, 261 [1st Dept 2004]), and comparative negligence is a defense (*Spages v Gary Null Assocs., Inc.*, 14 AD3d 425, 426 [1st Dept 2005]).

IBK, Flintlock, and 160 Wooster argue that this cause of action fails because plaintiff cannot identify any specific or applicable provision of the Industrial Code. In his bill of particulars, plaintiff alleges that defendants violated over 30 regulations: 12 NYCRR 23-1.5, 23-1.7, 23-1.8, 23-1.13, 23-1.15, 23-1.16, 23-1.17, 23-1.18, 23-1.19, 23-1.20, 23-1.21, 23-1.22, 23-1.23, 23-1.24, 23-1.28, 23-1.30, 23-1.32, 23-1.33, 23-2.1, 23-2.2, 23-2.3, 23-2.4, 23-2.5, 23-2.6, 23-2.7, 23-3.2, 23-3.3, 23-3.4, 23-4, 23-5.1-.9, 23-5.10-.22, 23-7.1, 23-8.2, 23-9.2, section C26-1907.1-9 of the New York City Charter and Administrative Code, and the OSHA rule codified in 29 CFR § 1910. However, in support of his cross motion, plaintiff argues that he is entitled to summary judgment based on the following five sections of the Industrial Code: 23-1.7 (b), 23-1.15, 23-1.16, 23-1.17 and 23-1.21.

### **23-1.7 (b) and 23-1.15**

The interpretation of an Industrial Code provision and determination as to whether a particular condition falls within its scope are issues of law for the court (*Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]). Section 23-1.7 (b), entitled “Falling hazards,” states that:

Every hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part (rule).

...

Where employees are required to work close to the edge of such an opening, such employees shall be protected as follows:

- (a) Two-inch *planking* . . . installed not more than one floor or 15 feet, whichever is less, beneath the opening; or
- (b) An approved *life net* installed not more than five feet beneath the opening; or
- (c) An approved *safety belt* with attached lifeline which is properly secured to a

substantial anchorage.

(emphasis added). This provision has been held to be sufficiently concrete to support this claim (*Olsen v James Miller Marine Serv., Inc.*, 16 AD3d 169, 171 [1st Dept 2005]).

Although the regulation does not define a “hazardous opening,” case law reveals that it is meant to protect workers against “falls from an elevated area to a lower area through openings large enough for a person to fit” (*Bell v Bengomo Realty, Inc.*, 36 AD3d 479, 480 [1st Dept 2007], quoting *Messina*, 300 AD2d at 123; see also *Alvia v Teman Elec. Contr., Inc.*, 287 AD2d 421, 423 [2d Dept 2001], *lv dismissed* 97 NY2d 749 [2002]). The regulation does not apply where the hole is too small for a worker to fall through (*Alvia*, 287 AD2d at 423). Here, the evidence shows that plaintiff fell off the edge of the eighth floor near the safety railing, not into a hole or opening in the floor. Therefore, this regulation does not apply (see e.g. *Smith v McClier Corp.*, 38 AD3d 322, 323 [1st Dept 2007] [unrailed staircase not a “hazardous opening”]; *Boss v Integral Constr. Corp.*, 249 AD2d 214, 215 [1st Dept 1998] [plaintiff injured while installing windows did not fall through “hazardous opening”]; *Bennion v Goodyear Tire & Rubber Co.*, 229 AD2d 1003 [4th Dept 1996] [plaintiff that fell three to four feet from rafter to floor did not fall through “hazardous opening”]). Neither was plaintiff engaged in bridge or highway construction at the time of his accident, such that subdivision (b) (2) would apply.

12 NYCRR 23-1.15, entitled “Safety railing,” provides that “[w]henever required by this Part (rule), a safety railing shall consist as a minimum of an assembly constructed as follows: (a) A two inch by four inch horizontal wooden hand rail . . .; [and] (c) A one inch by four inch toeboard except when such safety railing is installed at grade or ground level or is not adjacent to any opening, pit or other area which may be occupied by any person.” This provision has also been held to be

sufficiently specific (*Donohue v CJAM Assocs., LLC*, 22 AD3d 710, 712 [2d Dept 2005]). “12 NYCRR 23-1.15 discusses what constitutes an adequate safety railing when one is required under the Industrial Code. When read in conjunction with . . . 12 NYCRR 23-1.7 (b) (1), . . . a violation of 12 NYCRR 23-1.15 may be established” (*Wells v British Am. Dev. Corp.*, 2 AD3d 1141, 1144 [3d Dept 2003]). Inasmuch as there is no violation of 23-1.7 (b) (1), this regulation does not apply.

#### **23-1.16 and 23-1.17**

Sections 23-1.16 and 23-1.17, which set forth rules for the use of safety belts, harnesses, tail lines, lifelines, and life nets, do not apply to these facts. These sections pertain only to situations when such safety devices are provided (*D'Acunti v New York City School Constr. Auth.*, 300 AD2d 107, 108 [1st Dept 2002]; *Spenard v Gregware Gen. Contr.*, 248 AD2d 868, 870-871 [3d Dept 1998]). Plaintiff has not asserted that any such devices were provided, but rather claims that they should have been provided to him. Therefore, these sections cannot serve as a basis for his section 241 (6) claim (*see Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336, 337 [1st Dept 2006]).

#### **23-1.21**

Section 23-1.21 provides the rules for ladders and ladderways, which has been held to be a sufficiently specific provision (*see Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173, 176 [1st Dept 2004]). Although two of the rules apply to fiberglass and A-frame ladders, neither of them apply here. Subdivision (a), which requires approval for the use of fiberglass ladders that are more than 10 feet in length, does not apply because plaintiff claims that he was using an 8-foot ladder (*Broszkiewicz Aff.*, ¶ 3). Subdivision (b) (8) requires that A-frame ladders be equipped with locking spreaders to hold the base in place. However, there is no evidence that the ladder lacked such a spreader or that the accident was caused by the lack of a spreader.

The remaining subdivisions are clearly inapplicable. First, there is no evidence that plaintiff's accident was caused by any weakness, protective coating, or defect in the ladder, such that (b) (1)-(3) would apply.

Second, the ladder was also not being used as a "regular means of access between floors or other levels in any building or other structure" (12 NYCRR 23-1.21 [b] [4] [i]), and thus, subdivision (b) (4) (i) does not apply (*see Arigo v Spencer*, 39 AD3d 1143 [4th Dept 2007]; *Spenard*, 248 AD2d at 871).

Third, subdivision (b) (4) (ii), which requires that "[a]ll ladder footings . . . be firm" and that "[s]lippery surfaces and insecure objects . . . not be used as ladder footings," is a sufficiently specific regulation (*Hart v Turner Constr. Co.*, 30 AD3d at 214). However, it does not apply because there is no evidence that the ladder footings had anything to do with plaintiff's accident, or that the ladder was placed on a slippery or unstable object (*see Arigo*, 39 AD3d 1143, *supra*; *cf. Jamison v County of Onondaga*, 17 AD3d 1142, 1143 [4th Dept 2005] [issue of fact as to whether regulation applied where ladder was leaning against crane at construction site]).

Finally, because plaintiff was not using a leaning ladder, stepladder, scaling or rail type, wooden, or metal ladder, subdivisions (b) (4) (iii), (iv), (v), (5), (7), (10) and (e) do not apply. There is no evidence that the ladder was spliced or that it was placed in a door opening, and thus (b) (6) and (9) do not apply. The court cannot discern any reason why either 12 NYCRR 23-1.21 (c), relating to rungs and cleats, or why 12 NYCRR 23-1.21 (d), relating to the requirements for extension ladders and sectional ladders, applies. Neither does subdivision (f) apply, since plaintiff was not using a ladderway exceeding 70 feet in height.

**23-1.5, 23-1.7 (c), (d), (e), 23-1.8, 23-1.13, 23-1.18, 23-1.19, 23-1.20, 29 CFR § 1910, and C26-1907.1-9 of New York City Charter and Administrative Code**

IBK, Flintlock, and 160 Wooster argue that these regulations plainly do not apply to plaintiff's accident. Plaintiff has not opposed dismissal of this claim to the extent it is based on these regulations.

Section 23-1.5, which sets forth an employer's obligation to provide general health and safety in the workplace, has been held to be a general safety directive, and not a sufficient basis for a section 241 (6) claim (*Carty v Port Auth. of N.Y. and N.J.*, 32 AD3d 732, 733 [1st Dept 2006]). Violation of the City Charter, Administrative Code, or an OSHA rule, such as 29 CFR § 1910, also does not provide a predicate for liability under the statute (*Schiulaz v Arnell Constr. Corp.*, 261 AD2d 247, 248 [1st Dept 1999]; *Heller v 83<sup>rd</sup> St. Investors Ltd. Partnership*, 228 AD2d 371, 372 [1st Dept], *lv denied* 88 NY2d 815 [1996]).

12 NYCRR 23-1.8 requires that owners and general contractors provide protective equipment, such as eye protection, safety hats, and respirators, under certain enumerated situations. However, plaintiff does not allege any facts requiring such equipment. Neither do any of the situations in section 23-1.7 (c), (d), (e), 23-1.13, 23-1.18, 23-1.19, or 23-1.20 apply here. Lastly, IBK, Flintlock, and 160 Wooster have not shown how any of the remaining regulations in the bill of particulars do not apply.

**Labor Law § 200 and Common-Law Negligence**

Plaintiff agreed to withdraw his Labor Law § 200 and negligence claims as against 160 Wooster in his opposition. Accordingly, these claims are dismissed.

As a result, only Flintlock's liability is at issue. Labor Law § 200 requires that "[a]ll places

to which [the Labor Law] applies” be “so constructed, equipped, arranged, operated, and conducted as to provide reasonable and adequate protection” to employees (*Jock v Fien*, 80 NY2d 965, 967 [1992]). Section 200 is a codification of the common-law duty imposed upon an owner and general contractor to maintain a safe work site (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). To impose liability on a general contractor when a dangerous condition arises from a subcontractor’s means and methods, the general contractor must have the authority to supervise the plaintiff’s work, or provide him with tools and equipment (*see Landa v City of New York*, 17 AD3d 180, 181-182 [1st Dept 2005]; *Reilly v Newireen Assocs.*, 303 AD2d 214, 219-221 [1st Dept], *lv denied* 100 NY2d 508 [2003]).

Flintlock submits evidence indicating that it did not direct the manner in which any of the subcontractors performed their work (Kunz EBT, at 32, 41), and that all of plaintiff’s equipment was provided by IBK (Dolotov EBT, at 115). Plaintiff has not pointed to any contradictory evidence. Thus, summary judgment dismissing these claims as against Flintlock is also warranted (*see Reilly*, 303 AD2d at 219).

#### **Labor Law § 241-a**

Although IBK moves for summary judgment dismissing the complaint, it makes no argument regarding plaintiff’s Labor Law § 241-a cause of action. Therefore, the court declines to dismiss this claim.

#### **Indemnification and Contribution**

“A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the agreement, and the surrounding facts and circumstances” (*Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d

774, 777 [1987] [internal quotation marks and citation omitted]). The indemnification provision in the contract between Flintlock, the general contractor, and IBK, the subcontractor, provides that “[t]o the fullest extent permitted by law, [IBK] shall indemnify and hold harmless the Owner, [Flintlock], Architect, Architect’s consultants . . . from and against claims, damages, losses and expenses . . . arising out of or resulting from performance of [IBK’s] Work under this Subcontract . . . *but only to the extent caused by the negligent acts or omissions of the Subcontractor*, the Subcontractor’s Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused by a party to be indemnified hereunder” (Kovner Affirm., Exh. A., § 4.6.1 [emphasis added]). As a result, IBK’s obligation to indemnify Flintlock is triggered only upon a finding of negligence against it. Although Flintlock has demonstrated that it did not supervise or control plaintiff’s work, there are issues of fact as to IBK’s negligence in causing plaintiff’s accident (*see Kader v City of New York*, 16 AD3d 461, 463 [2d Dept 2005]; *cf. Santos v BRE/Swiss, LLC*, 9 AD3d 303, 304 [1st Dept 2004]).

As for 160 Wooster’s indemnification claims, the indemnification clause in its contract with Flintlock, the general contractor, states that “[t]o the fullest extent permitted by law, [Flintlock] shall indemnify, hold harmless and defend 160 Wooster Street LLC against any and all losses, claims, actions, demands, damages, liabilities, or expenses . . . arising directly from the performance of [Flintlock’s] work or from any of the acts or omissions on the part of the Contractor, its employees, agents[,] representatives, material men, suppliers, and or subcontractors” (Maroney Affirm., Exh. B, Addendum to Art. 11.1.1). However, 160 Wooster has failed to make a prima facie showing that it did not supervise or direct any of plaintiff’s work. Accordingly, that branch of its motion for contractual indemnification is premature (*see General Obligations Law* § 5-322.1; *Cuevas v City of*

*New York*, 32 AD3d 372, 374 [1st Dept 2006]).

In view of the fact that the negligence claims as against Flintlock are dismissed, 160 Wooster's common-law indemnification and contribution claims against Flintlock are also dismissed.

### CONCLUSION

Accordingly, it is

**ORDERED** that the motion by third-party defendants IBK Construction Corp. and IBK Enterprises, Inc. for summary judgment dismissing the complaint is granted to the extent of severing and dismissing the Labor Law § 200/negligence claims as against defendant Flintlock and the Labor Law § 241 (6) claim as against Flintlock to the extent it is based upon 12 NYCRR 23-1.5, 12 NYCRR 23-1.7 (b), (c), (d), and (e), 12 NYCRR 23-1.8, 12 NYCRR 23-1.13, 12 NYCRR 23-1.15, 12 NYCRR 23-1.16, 12 NYCRR 23-1.17, 12 NYCRR 23-1.18, 12 NYCRR 23-1.19, 12 NYCRR 23-1.20, 12 NYCRR 23-1.21, section C26-1907.1-9 of the New York City Charter and Administrative Code, and 29 CFR § 1910, and is otherwise denied; and it is further

**ORDERED** that the cross motion by plaintiff Adam Broszkiewicz for partial summary judgment is granted to the extent of granting judgment on the issue of liability on his Labor Law § 240 (1) cause of action, and is otherwise denied; and it is further

**ORDERED** that the cross motion by defendant/third-party plaintiff Flintlock Construction Services, LLC for summary judgment is granted to the extent of severing and dismissing the Labor Law § 200/negligence claims and the Labor Law § 241 (6) claim to the extent it is based upon 12 NYCRR 23-1.5, 12 NYCRR 23-1.7 (b), (c), (d), and (e), 12 NYCRR 23-1.8, 12 NYCRR 23-1.13,

12 NYCRR 23-1.15, 12 NYCRR 23-1.16, 12 NYCRR 23-1.17, 12 NYCRR 23-1.18, 12 NYCRR 23-1.19, 12 NYCRR 23-1.20, 12 NYCRR 23-1.21, section C26-1907.1-9 of the New York City Charter and Administrative Code, and 29 CFR § 1910, and is otherwise denied; and it is further

**ORDERED** that the cross motion by defendant 160 Wooster Street for summary judgment is granted to the extent of severing and dismissing the Labor Law § 200/negligence claims and Labor Law § 241 (6) claim to the extent it is based upon 12 NYCRR 23-1.5, 12 NYCRR 23-1.7 (b), (c), (d), and (e), 12 NYCRR 23-1.8, 12 NYCRR 23-1.13, 12 NYCRR 23-1.15, 12 NYCRR 23-1.16, 12 NYCRR 23-1.17, 12 NYCRR 23-1.18, 12 NYCRR 23-1.19, 12 NYCRR 23-1.20, 12 NYCRR 23-1.21, section C26-1907.1-9 of the New York City Charter and Administrative Code, and 29 CFR § 1910, and is otherwise denied; and it is further

**ORDERED** that the cross claims by defendant 160 Wooster, LLC as against defendant Flintlock Construction Services, LLC for common-law indemnification and contribution are severed and dismissed; and it is further

**ORDERED** that the remainder of the action shall continue.

Dated: *6/4/07*  
New York, New York

ENTER:

*[Signature]*

J.S.C.

HON. MICHAEL D. STALLMAN

**FILED**  
JUN 08 2007  
COUNTY CLERK'S OFFICE  
NEW YORK